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SSM MANAGEMENT SDN BHD v. AEON BIG (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
HARMINDAR SINGH DHALIWAL JCA
B [CIVIL APPEAL NO: W-02(NCC)(A)-1328-07-2017]
12 FEBRUARY 2019

COMPANY LAW: *Winding up – Appeal against winding up – Petition on grounds of inability to pay debt – Deposit under lease agreement became due upon*
C *termination – Whether obligation to refund deposit arose from terms of lease agreement – Whether creditor required to obtain judgment before issuing statutory demand – Whether presumption of insolvency arose once company failed to comply with statutory demand – Whether company willing and able to meet demand – Companies Act 1965, ss. 218(1)(e) & (2)(a)*

D

The appellant and the respondent executed a lease agreement on 22 June 2012 whereby the appellant agreed to lease a plot of land for a period of 30 years to the respondent, subject to condition precedents. The respondent paid a deposit of RM1.1 million to the appellant, which was to be refunded to the respondent upon the determination of the lease agreement. There was
E a disagreement as to the non-fulfilment of certain conditions precedent as stipulated in the lease agreement before the cut-off date. On 23 September 2013, the appellant rescinded the lease agreement and attempted to refund the deposit. The respondent commenced a legal action against the appellant for specific performance ('2014 civil suit'). The respondent returned the
F appellant's cheque for the sum of RM1.1 million to the appellant's solicitors to be held as stakeholder pending the outcome of the 2014 civil suit. In dismissing the 2014 civil suit, the High Court held that the appellant had correctly exercised its right to terminate the lease agreement. The respondent thus demanded the refund of the deposit from the appellant but the appellant
G ignored and/or refused to refund the deposit. Therefore, the respondent commenced winding-up proceedings against the appellant pursuant to s. 218(1)(e) and s. 218(2)(a) of the Companies Act 1965 based on the appellant's inability to pay its debt to the respondent. The appellant was wound up and hence, this appeal. The issues raised by the appellant in the
H appeal, which were the same issues raised in the High Court, were: (i) there was no order in the 2014 civil suit to pay the alleged debt of RM1.1 million; (ii) there was a substantial cross-claim which far exceeded the sum of the alleged debt in the statutory notice; and (iii) the appellant was a solvent company and was able to pay its debt as and when it accrued. In relation to the cross-claim, the background was that the land in the lease agreement was
I owned by Nobletree Dynamics Sdn Bhd ('Nobletree'). Nobletree had executed a long term lease agreement with the appellant on 9 May 2011. There was also purportedly a supplemental long lease agreement dated

14 June 2011 in which it was alleged that a total sum of RM23,560,000 was paid by the appellant to Nobletree which sum was purportedly forfeited by Nobletree because of the respondent's wrongful entry of a private caveat on the said land. The appellant was seeking to prove the assertions in the 2017 civil suit filed on 2 May 2017.

Held (dismissing appeal with costs)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) There was a clear and unequivocal admission of indebtedness by the various attempts by the appellant to effect repayment of the sum of RM1.1 million being the deposit under the lease agreement before decision was pronounced in the 2014 civil suit. This sum was however returned by the respondent pending the outcome of the action. By the terms of the lease agreement, there was an obligation to refund the deposit in the event of termination. The obligation flowed from the termination of the lease agreement, *ie*, the legal consequence of the termination. (paras 12 & 13)

(2) It is trite law that a creditor is not required to obtain a judgment before issuing the statutory demand. The primary consideration is whether there is compelling evidence of an inability to pay debt when it falls due whether under a judgment or otherwise. The respondent was relying on the consequences attendant upon the decision in the 2014 civil suit and not on the judgment itself. The obligation to refund the deposit of RM1.1 million arose from the terms of the lease agreement pursuant to the judgment in the 2014 civil suit that the lease agreement had been lawfully terminated. (paras 14 & 15)

(3) The trial judge found the cross-claim to be an afterthought and devoid of any real substance and held, *inter alia*, that the purported supplemental long lease agreement was never raised or mentioned by the appellant. In fact, the respondent was only made aware of the allegations surrounding the forfeiture after the filing of the petition when it received the writ and statement of claim for the 2017 civil suit. The appellant did not produce any document apart from the writ and statement of claim, which, in any event, were tellingly only filed subsequent to the commencement of the winding-up proceedings by the petitioner. Not even the supplemental long lease agreement was exhibited or relevant documentation such as resolutions authorising the execution of the same or that evidencing the purported payment of the RM23,560,000 to Nobletree, was adduced. Hence, the argument on the cross-claim was without merit. (paras 16-18)

(4) It is settled law that once a company has failed to comply with the statutory demand, there is a presumption of insolvency against it. The onus then shifts to the company to show that it is able to pay all its debts at the material time. The test of insolvency is the test of commercial insolvency or cash flow insolvency in that the company must be able to

pay its debts when they fall due and not at some future date, *ie*, the company must be willing and able to meet the current demand of the creditor. A company cannot be said to be solvent when it asserts that it is able to pay the debt but persists in not doing so. (para 20)

(5) Any attempt to displace the presumption of insolvency must go beyond opinions of insolvency by auditors. Rather than mere assertions of insolvency even by professionals, a company must produce the best evidence of its financial position in the form of audited statements and accounts. Having failed to produce its latest audited financial statements, the appellant fell far short of establishing its solvency. Further, the appellant's failure to respond to the six letters of demand had weakened the probative force of the argument against insolvency. Hence, the contention of solvency failed. (paras 22 & 23)

Bahasa Malaysia *Headnotes*

Perayu dan responden memeterai satu perjanjian pajakan pada 22 Jun 2012 dan perayu bersetuju memajak satu plot tanah untuk tempoh 30 tahun kepada responden, tertakluk pada syarat awalan. Responden membayar RM1.1 juta kepada perayu, yang perlu dipulangkan kepada responden jika perjanjian pajakan itu ditamatkan. Wujud pertikaian kerana syarat awalan tertentu yang diperuntukkan dalam perjanjian pajakan tidak dipenuhi sebelum tarikh tamat. Pada 23 September 2013, perayu membatalkan perjanjian pajakan dan mencuba memulangkan deposit. Responden memulakan tindakan undang-undang terhadap perayu untuk pelaksanaan spesifik ('guaman sivil 2014'). Responden memulangkan cek perayu untuk jumlah RM1.1 juta kepada peguam perayu untuk dipegang sebagai pemegang amanah sehingga pemutusan guaman sivil 2014. Mahkamah Tinggi, dalam menolak guaman sivil 2014, memutuskan perayu telah melaksanakan haknya dengan betul untuk menamatkan perjanjian pajakan. Oleh itu, responden menuntut pemulangan deposit tersebut daripada perayu tetapi perayu tidak mengendahkan dan/atau enggan memulangkan deposit tersebut. Oleh itu, responden memulakan prosiding penggulungan terhadap perayu menurut s. 218(1)(e) dan s. 218(2)(a) Akta Syarikat 1965 atas asas ketidakupayaan perayu membayar hutangnya kepada responden. Perayu digulungkan dan dengan itu, rayuan ini. Isu-isu yang ditimbulkan oleh perayu dalam rayuan ini, yang sama dengan isu-isu yang dibangkitkan di Mahkamah Tinggi, adalah: (i) tiada perintah dalam guaman sivil 2014 untuk membayar hutang RM1.1 juta yang dikatakan; (ii) terdapat tuntutan silang yang substansial yang jauh melangkaui jumlah hutang yang dinyatakan dalam notis statutori; dan (iii) perayu adalah syarikat yang solven dan berupaya membayar hutangnya sebaik sahaja dan apabila hutang terakru. Berkaitan dengan tuntutan silang, latar belakangnya adalah bahawa tanah dalam perjanjian pajakan dimiliki oleh Nobletree Dynamics Sdn Bhd ('Nobletree'). Nobletree memasuki perjanjian pajakan jangka panjang dengan perayu pada 9 Mei 2011. Juga dikatakan terdapat perjanjian pajakan panjang tambahan bertarikh 14 Jun

2011 yang kononnya menyatakan jumlah keseluruhan RM23,560,000 dibayar perayu kepada Nobletree dan jumlah itu dirampas oleh Nobletree kerana kemasukan kaveat persendirian atas tanah itu secara salah oleh responden. Perayu memohon untuk membuktikan pernyataan-pernyataan dalam guaman sivil 2017 yang difailkan pada 2 Mei 2017.

Diputuskan (menolak rayuan dengan kos)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Terdapat pengakuan jelas berkaitan keberhutangan melalui berbagai cubaan perayu untuk membuat bayaran sejumlah RM1.1 juta sebagai deposit bawah perjanjian pajakan sebelum keputusan diberi dalam guaman sivil 2014. Walau bagaimanapun, jumlah ini dikembalikan responden sehingga pemutusan tindakan itu. Melalui terma perjanjian pajakan, wujud tanggungjawab untuk memulangkan deposit jika berlaku penamatan. Tanggungjawab itu berikutan penamatan perjanjian pajakan, iaitu, akibat daripada penamatan dari segi undang-undang.

(2) Undang-undang matan bahawa pemiutang tidak perlu memperoleh penghakiman sebelum mengeluarkan tuntutan statutori. Pertimbangan utama ialah sama ada terdapat keterangan yang meyakinkan mengenai ketidakupayaan membayar hutang apabila tiba masanya sama ada melalui penghakiman atau sebaliknya. Responden menyandar pada akibat keputusan dalam guaman sivil 2014 dan bukan penghakiman itu sendiri. Tanggungjawab untuk memulangkan deposit RM1.1 juta timbul daripada terma-terma perjanjian pajakan berikutan penghakiman guaman sivil 2014 bahawa perjanjian pajakan itu ditamatkan secara sah.

(3) Hakim bicara mendapati tuntutan silang adalah fikiran semula dan tiada inti pati sebenar dan memutuskan, antara lain, perjanjian pajakan panjang tambahan tidak pernah dibangkitkan atau disebut oleh perayu. Sebenarnya, responden hanya mengetahui tentang dakwaan-dakwaan yang menyelubungi rampasan selepas pemfailan petisyen apabila responden menerima writ dan penyata tuntutan untuk guaman sivil 2017. Perayu tidak mengemukakan apa-apa dokumen selain daripada writ dan penyata tuntutan, yang, walau bagaimanapun, jelas hanya difailkan selepas permulaan prosiding penggulungan oleh responden. Perjanjian pajakan panjang tambahan atau apa-apa dokumen relevan, seperti resolusi yang memberi kuasa menandatangani atau keterangan bayaran RM23,560,000 yang kononnya dibuat kepada Nobletree, juga tidak dikemukakan. Oleh itu, hujahan berkaitan tuntutan silang tidak bermerit.

(4) Undang-undang matan bahawa jika syarikat gagal memenuhi tuntutan statutori, anggapan ketaksolvenan berbangkit terhadapnya. Beban kemudiannya beralih kepada syarikat untuk menunjukkan bahawa ia mampu membayar kesemua hutangnya pada masa material. Ujian

ketaksolvenan ialah ujian ketaksolvenan komersial atau ketaksolvenan aliran tunai dalam syarikat semestinya membolehkan bayaran hutang apabila tiba masanya dan bukan pada suatu masa akan datang, iaitu, syarikat mesti berniat dan boleh memenuhi tuntutan semasa pemiutang. Sesebuah syarikat tidak boleh dikatakan solven apabila syarikat itu menyatakan ia boleh membayar hutang tetapi berkeras untuk tidak membayar.

(5) Apa-apa cubaan untuk menggantikan anggapan ketaksolvenan semestinya melampaui pendapat ketaksolvenan auditor-auditor. Berbanding pernyataan ketaksolvenan semata-mata walaupun oleh profesional-profesional, sesebuah syarikat mesti mengemukakan keterangan terbaik tentang kedudukan kewangannya dalam bentuk penyata-penyata dan akaun-akaun beraudit. Apabila gagal mengemukakan penyata kewangan beraudit terkini, perayu gagal membuktikan kesolvenannya. Selanjutnya, kegagalan perayu menjawab enam surat tuntutan melemahkan daya probatif hujahan menentang ketaksolvenan. Oleh itu, hujahan kesolvenan gagal.

Case(s) referred to:

Ahmad Shahrir Nazi v. Nashrul Hazimie Ab Halim & Ors [2016] 5 CLJ 409 HC ***(refd)***

Hup Heng Poultry Industries Pte Ltd v. Flavour Right Sdn Bhd [2015] 1 LNS 958 HC ***(refd)***

Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763 CA ***(refd)***

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317 SC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 165A, 218(1)(e), (2)(a)

For the appellant - Kelvin Seet Wan Nam & Dennis Yuean; M/s Chooi & Company + Cheang & Ariff

For the respondent - R Jayasingam; M/s BH Lawrence & Co

[Editor's note: For the High Court judgment, please see AEON Big (M) Sdn Bhd v. SSM Management Sdn Bhd [2017] 1 LNS 998 (affirmed).]

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This appeal arose from the order of the Kuala Lumpur High Court dated 23 June 2017. The learned judge had allowed the winding-up petition filed by the respondent under ss. 218(1)(e) and 218(2)(a) of the now repealed Companies Act 1965 ("CA 1965") and wound up the appellant company.

[2] Aggrieved with the decision, the appellant filed the instant appeal. After hearing the parties and taking into consideration the written submissions, we unanimously dismissed the appeal and affirmed the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

Background Facts

[3] The facts leading to the presentation of the winding-up petition are not disputed and have been summarised by the parties in their submissions and by the learned judge as follows. The appellant and the respondent executed a lease agreement dated 22 June 2012 ("the lease agreement") whereby the appellant agreed to lease a plot of land ("the said land") for a period of 30 years to the respondent. The lease agreement was subject to conditions precedent.

[4] A deposit amounting to RM1.1 million was paid by the respondent to the appellant under the lease agreement. Pursuant to the lease agreement, the appellant was to refund the deposit to the respondent upon the determination of the lease agreement.

[5] On 23 September 2013, the appellant rescinded the lease agreement and attempted to refund the said deposit. Prior to that, there was a disagreement as to the non-fulfillment of certain conditions precedent as stipulated in the lease agreement before the cut-off date. This resulted in the respondent commencing legal action in Suit No. 22NCVC-113-03-2014 in the KL High Court ("2014 civil suit") against the appellant for specific performance.

[6] The respondent returned the appellant's cheque for the sum of RM1.1 million to the appellant's solicitors and indicated that the deposit of RM1.1 million was to be held by the appellant's solicitors as stakeholder pending the outcome of the 2014 civil suit. Nevertheless, the 2014 civil suit was dismissed by the KL High Court on 29 July 2016 with costs of RM20,000 to the appellant. The KL High Court essentially decided that the appellant had correctly exercised its right to terminate the lease agreement.

[7] Subsequent to the dismissal of the 2014 civil suit, the respondent demanded the refund of the deposit of RM1.1 million from the appellant. Despite several letters of demand, the appellant ignored and/or refused to refund the said deposit of RM1.1 million. The respondent then commenced the instant winding-up proceedings against the appellant based on the appellant's inability to pay its debt to the respondent. The proceedings were consequent to the issuance by the respondent of the statutory winding-up notice under s. 218 of the CA 1965.

A **At The High Court**

[8] At the High Court, the appellant raised several issues to resist the winding-up petition. The first key issue was that the appellant was not liable to pay the alleged debt of RM1.1 million as it was not so ordered in the 2014 civil suit. The second argument raised to defeat the petition was that the
B appellant had a substantial cross-claim against the respondent in the form of a civil suit filed on 2 May 2017 ("2017 civil suit") which claim exceeded the amount of the alleged debt. As such, the alleged debt was being disputed on *bona fide* grounds. The third issue was the contention by the appellant that it was a solvent company as evidenced by the auditor's statement which must
C be accepted as rebutting the presumption of insolvency.

[9] The learned judge, however, was not impressed by the arguments raised in opposition to the petition and granted the winding-up of the appellant. The reasons for doing so are now being assailed by the appellant but for the moment, it will be useful and sufficient to summarise the key
D findings of the learned judge as follows:

(i) The appellant's obligation to refund the deposit of RM1.1 million flows from the terms of the lease agreement and the termination of the lease agreement which has since been judicially ruled to be lawful.

E (ii) The 2017 civil suit filed by the appellant subsequent to the commencement of the winding-up proceedings is not a genuine cross-claim and not one based on substantial grounds. The 2017 civil suit is an afterthought and devoid of real substance.

(iii) Although the appellant is an exempt private company, its burden of
F proving that it is solvent is not different from the company that has the statutory obligation to file its annual return. Section 165A of the Companies Act 1965 does not dispense with the requirement for an exempt private company from having to prepare its audited accounts. The appellant has not rebutted the presumption of insolvency.

G **The Instant Appeal**

[10] Before us, the appellant raised the same key arguments that were raised in the High Court and which were set out earlier. After due consideration, we did not think the learned judge was in error in his findings. We did not
H find any merit in the arguments raised before us. In relation to the issues and arguments raised, we considered and decided in the following fashion.

No Debt Due And Payable

[11] The first complaint of the appellant was that there was no order in the 2014 civil suit to pay the alleged debt of RM1.1 million. Citing the case of
I *Ahmad Shahrir Nazri v. Nashrul Hazimie Ab Halim & Ors* [2016] 5 CLJ 409; [2016] 10 MLJ 15, the appellant argued that the respondent ought to have asked for a consequential order for the deposit to be refunded. Having failed

to do so, the appellant contended that the respondent could not use the winding-up petition as a machinery for trying a common law action. A civil claim ought to have been filed to claim for the refund as decided in *Hup Heng Poultry Industries Pte Ltd v. Right Sdn Bhd* [2015] 1 LNS 958; [2015] MLJU 716.

[12] With respect, we do not think there is any merit in the arguments raised as aforesaid. What is compelling is that there was a clear and unequivocal admission of indebtedness by the various attempts by the appellant to effect repayment of the sum of RM1.1 million being the deposit under the lease agreement before decision was pronounced in the 2014 civil suit. This sum was however returned by the respondent pending the outcome of the 2014 civil suit for specific performance of the lease agreement.

[13] Even when faced with this admission, the appellant did not deny its liability to make the refund of the RM1.1 million. All the appellant did was to maintain its position that there was no order to refund in the 2014 civil suit. This position was rather disingenuous as by the terms of the lease agreement, there was an obligation to refund the deposit in the event of termination. We agree with the learned judge that this obligation to pay flowed from the termination of the lease agreement, or in other words, was the legal consequence of the termination.

[14] It was also pointless to argue that there must be a judgment for the sum of RM1.1 million before winding-up proceedings can be commenced. It is trite law that a creditor is not required to obtain a judgment before issuing the statutory demand (see *Morgan Guaranty Trust Company New York v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317; [1991] 1 MLJ 95; *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817). Of course, if there is a judgment, a debtor would be hard-pressed to argue that the debt in question is disputed. Conversely, a debtor would be better placed to argue a *bona fide* dispute exists when there is no judgment. Even then, the debtor must provide cogent reasons to show the existence of a *bona fide* dispute. The primary consideration is whether there is compelling evidence of an inability to pay a debt when it falls due whether under a judgment or otherwise.

[15] In the instant case, the respondent was relying on the consequences attendant upon the decision in the 2014 civil suit and not on the judgment itself. We agree with the learned judge that the obligation to refund the deposit of RM1.1 million arose from the terms of the lease agreement pursuant to the judgment in the 2014 civil suit that the lease agreement had been lawfully terminated. For these reasons, this argument by the appellant cannot succeed.

A **The Existence Of A Substantial Cross-Claim**

[16] In this context, the appellant asserted that there existed a substantial cross-claim which far exceeded the sum of the alleged debt in the statutory notice. The background to the cross-claim was that the land in the lease agreement is owned by Nobletree Dynamics Sdn Bhd ("Nobletree").
B Nobletree had executed a long term lease agreement with the appellant on 9 May 2011. There was also purportedly a supplemental long lease agreement dated 14 June 2011 in which it was alleged that a total sum of RM23,560,000 was paid by the appellant to Nobletree which sum was purportedly forfeited by Nobletree because of the respondent's wrongful
C entry of a private caveat on the said land. The appellant is now seeking to prove these assertions in KL Suit No. WA-22NCVC-216-05-2017 filed on 2 May 2017 ("2017 civil suit").

[17] Now, the learned judge expressed grave doubt as to whether this cross-claim was genuine and of substance. On this score, we agree with the finding
D of the learned judge and the reasons provided. The learned judge in paras. [35] to [40] found as follows:

> [35] There is no disputing this principle. But is the cross-claim genuine and of substance? It cannot be denied that the purported Supplemental Long Lease Agreement was never raised or mentioned by the Respondent. In
E fact, the Petitioner was first made aware of the allegations surrounding the forfeiture after the filing of the petition when it received the writ and statement of claim for the 2017 Civil Suit.
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> [36] Instead, the Petitioner could furnish documentary evidence to demonstrate that the Respondent had never once mentioned even a word
F in relation to the alleged existence of this purported Supplemental Long Lease Agreement. First, in the Lease Agreement between the Petitioner and the Respondent, only the Main Lease Agreement dated 1 May 2011 between the Respondent with Nobletree was disclosed and there is no mention of the purported Supplemental Long Lease Agreement at all.
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> G [37] Secondly, neither was there any mention about the purported Supplemental Long Lease Agreement in the correspondences between the Petitioner's solicitors and the Respondent in respect of the Lease Agreement.
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> [38] Thirdly, since the commencement of the Petitioner's 2014 Civil Suit on 13 March 2014 against the Respondent, and until delivery of the Court
H decision on 29 July 2016 after full trial, the Respondent never raised or pleaded the existence of the Supplemental Long Lease Agreement.
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> [39] Fourthly, the Respondent also did not reply to any of the several letters of demand sent by the Petitioner's solicitors nor raise the existence of the Supplemental Long Lease Agreement when the Respondent's
I solicitors did eventually make a reply to the Petitioner's 218 Notice.

> [40] In short, the Respondent produced nothing apart from the writ and statement of claim which in any event were tellingly only filed subsequent to the commencement of the winding up proceedings by the Petitioner. Not even the Supplemental Long Lease Agreement was exhibited. Not to mention the absence of any attempt to show relevant documentation such as resolutions authorising the execution of the same or that evidencing the purported payment of the RM23,560,000 to Nobletree.

[18] In the event, the learned judge found the cross-claim to be an "afterthought and devoid of real substance". In other words, it was not a genuine claim based on substantial grounds. The appellant now contends that the learned judge had failed to appreciate the appellant's claim in the 2017 civil suit and was not entitled to adjudicate upon a matter pending in the civil court. We do not agree. In our view, the learned judge was entitled to consider if the cross-claim was genuine and based on substantial grounds. As alluded to earlier, the findings by the learned judge in this context were clearly warranted. Again, we were not persuaded that this argument had any merit.

Whether The Appellant Is A Solvent Company

[19] In its final key argument, the appellant contended that it was indeed a solvent company and was able to pay its debt as and when it accrues. In this respect, the appellant relied upon two documents. The first was the auditors' statement dated 30 December 2016 ("auditors' statement") and the second was the certificate relating to an exempt private company also dated 30 December 2016 ("EPC certificate"). In essence, these two documents provide that the appellant had kept proper accounting records and other books for the year 2016 and that the appellant appeared to have been able to meet its liabilities as and when they fall due.

[20] In this regard, it is settled law that once a company has failed to comply with the statutory demand, there is a presumption of insolvency against it. The onus then shifts to the company to show that it is able to pay all its debts at the material time. The test of insolvency, as the learned judge correctly noted, is the test of commercial insolvency or cash flow insolvency in that the company must be able to pay its debts when they fall due and not at some future date. In other words, the company must be willing and able to meet the current demand of the creditor. In this way, a company cannot be said to be solvent when it asserts that it is able to pay the debt but persists in not doing so.

[21] Now, the learned judge considered that the appellant had failed to show that it was solvent. The learned judge took the view that the two documents presented were insufficient. Instead, the appellant ought to have produced its audited financial statements. The appellant, before us, criticised this approach and submitted that the two documents were provided as part

of the appellant's statutory obligation under the CA 2016 and must be taken as the true and accurate reflection of the appellant's solvency. In short, the appellant was in effect contending that a winding up court should not go beyond the two documents in determining whether the presumption of insolvency has been rebutted.

[22] On this score, we do not think there is merit in the appellant's submission. In our view, any attempt to displace the presumption of insolvency must go beyond opinions of insolvency by auditors. We agree that rather than mere assertions of insolvency even by professionals, a company must produce the best evidence of its financial position in the form of audited statements and accounts. The appellant, even if it was an exempt private company, had an obligation under the law to maintain audited accounts.

[23] Having failed to produce its latest audited financial statements, as noted by the learned judge, we agreed with the finding that the appellant fell far short of establishing its solvency. Given the presumption of insolvency, the appellant ought to have taken seriously its duty and burden of displacing the presumption by putting all its card on the table and not hide merely behind opinions of the auditors through the two documents. In this context, we have also noted that the appellant failed to respond to six letters of demand, which we agree had weakened the probative force of the argument against insolvency as advanced by the appellant. In the upshot, this contention of solvency must fail.

The Result

[24] In the circumstances, and for the reasons provided, we were not persuaded that the decision of the learned judge was plainly wrong. On the contrary, the learned judge had exercised his discretion correctly. The appeal was therefore dismissed with costs of RM10,000. The order of the High Court was affirmed. Deposit to be refunded.